Internal Revenue Service

memorandum

CC:TL
Br3:SAHall

date: MAR 29 1989

to: Deputy Regional Counsel (Tax Litigation) CC:MW

from: Assistant Chief Counsel (Tax Litigation) CC:TL

subject: [redacted] Tax Court [redacted] and related cases.

This is in response to your request for our concurrence in your proposal to settle the pending cases that relate to the above action. These cases involve the deductibility under I.R.C. § 219 of contributions made to Individual Retirement Accounts ("IRA's") by federal judges. You propose that in light of the remaining litigating hazards and general concepts of fairness in tax administration that the government concede all cases currently docketed and held in suspense.

We continue to believe that the position taken by the Service in these case was, and is, the correct position. Clearly, the Tax Court believed otherwise, as evidenced by its opinion in Porter v. Commissioner, et al., 88 T.C. No. 28 (1987). The circuit courts that have considered the matter have split. The Third Circuit upheld the Tax Court's opinion in the consolidated appeals captioned Adams v. Commissioner, Nos.87-1394 through 87-1397 (3d Cir. 1988), whereas the Eighth Circuit reversed in favor of the Commissioner in Porter v. Commissioner, No. 87-1890 (8th Cir. 1988).

There are three groups of cases to be considered. Clearly, those cases that would be appealable to the Third Circuit should be conceded by the Service. Under the doctrine of Golsen v. Commissioner, 54 T.C. 742 (1970), the Tax Court would have to find for the taxpayers. The second group of cases consists of those cases appealable to the Eighth Circuit. Under the Golsen rule, those cases should be conceded by the taxpayers as the Tax Court would have to find for the Commissioner.

Finally, there are cases that are appealable to a circuit other than the Third or Eighth Circuits. Despite the Eighth Circuit's opinion and the vehement reversal of the Tax Court opinion by Congress in OBRA '87, it is likely that, absent a Golsen constraint, the Tax Court will rule in accord with its original [redacted] opinion. In light of OBRA '87 it is extremely unlikely that the Appellate Section of the Justice Department Tax Division would agree to appeal a case to a fresh circuit on this

issue. Thus, we would be litigating these cases only in the hope that the Tax Court would reverse itself. Chief Counsel resources are valuable, the revenue at issue is small, and the issue has been resolved by Congress for years after 1987. On these grounds, we agree to the concession of those cases that would go to a new circuit.

Accordingly, we agree to the concession of cases that would go to the Third Circuit and those cases that would go to a new circuit. We cannot agree, however, with a concession of any case whose venue is or would be to the Eighth Circuit. While we agree on a resources basis not to litigate cases that would go to new circuits, we continue to believe that the Tax Court was incorrect. Unlike the VA flight training cases you mentioned, we would be willing to litigate the cases appealable to new circuits if Justice would take the appeals. We believe that to concede the Eighth Circuit cases would weaken our future credibility with the appellate section the next time we push an appeal they are reluctant to take, and our credibility with the Hill the next time we assure them that we feel strongly enough about an issue to keep litigating it (the [redacted] appeals convinced the Hill staffs of the depth of our convictions).

Should you have any questions about this response, please contact Sarah A. Hall at FTS 566-3407.

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